129

(2)

FILED
MAY 15 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-884

In the Supreme Court of the United States

LAWRENCE S. BERGER, ET AL., PETITIONERS

v.

INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN DICICCO
Acting Assistant Attorney General
JONATHAN S. COHEN
GRETCHEN M. WOLFINGER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a court of appeals must review *de novo* a district court's grant of summary judgment on a claim arising under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

2. Whether the court of appeals correctly determined that the employee time sheets of an Internal Revenue Service (IRS) revenue officer are exempt from disclosure under FOIA Exemption 6, 5 U.S.C. 552(b)(6).

3. Whether the court of appeals correctly determined that the employee time sheets of an IRS revenue officer are Privacy Act records pertaining to the revenue officer, rather than the subjects of her investigatory work, which may not be disclosed without the consent of the revenue officer.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Abdelfattah v. *Department of Homeland Sec.*, 488 F.3d 178 (3d Cir. 2007) 5

Department of Defense v. *FLRA*, 510 U.S. 487 (1994) 3, 9, 10

Department of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 8, 10

Department of State v. *Washington Post Co.*, 456 U.S. 595 (1982) 8

Department of the Air Force v. *Rose*, 425 U.S. 352 (1976) 8

Lame v. *Department of Justice*, 767 F.2d 66 (3d Cir. 1985) 5, 6

Missouri ex rel. Garstang v. *Department of the Interior*, 297 F.3d 745 (8th Cir. 2002) 5

National Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 8, 9

Sheet Metal Workers Int'l Ass'n v. *Department of Veterans Affairs*, 135 F.3d 891 (3d Cir. 1998) 3, 6

Voelker v. *IRS*, 646 F.2d 332 (8th Cir. 1981) 12, 13

Statutes: Page

Freedom of Information Act, 5 U.S.C. 552 1
5 U.S.C. 552(b)(3) 2
5 U.S.C. 552(b)(6) 2, 8, 9
Privacy Act, 5 U.S.C. 552a 1
5 U.S.C. 552a(a)(2) 4
5 U.S.C. 552a(b) 4, 11
5 U.S.C. 552a(d)(1) 4, 11, 13
5 U.S.C. 552a(k)(2) 14
26 U.S.C. 6103 11
26 U.S.C. 6672 2

In the Supreme Court of the United States

No. 08-884

LAWRENCE S. BERGER, ET AL., PETITIONERS

v.

INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the *Federal Reporter* but is reprinted in 288 Fed. Appx. 829. The opinion of the district court (Pet. App. 11a-52a) is reported at 487 F. Supp. 2d 482.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2008. A petition for rehearing was denied on October 14, 2008 (Pet. App. 53a). The petition for certiorari was filed on January 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This Freedom of Information Act (FOIA), 5 U.S.C. 552, and Privacy Act, 5 U.S.C. 552a, lawsuit arises from a civil tax investigation conducted by the Inter-

nal Revenue Service (IRS). IRS Revenue Officer Mary Williams was assigned to that investigation, which focused on whether petitioners had appropriately withheld federal taxes from employees' paychecks. Cf. 26 U.S.C. 6672. No action was taken against petitioners as a result of the investigation. Pet. App. 2a, 12a & n.1, 48a n.1.

In December 2003, petitioners submitted a FOIA and Privacy Act request to the IRS, seeking documents associated with the investigation, including Officer Williams' employee time records. The IRS released numerous documents in response to petitioners' request, but it withheld the time records and certain other responsive documents no longer at issue in this case. Pet. App. 2a-3a, 12a-15a.

2. In August 2005, petitioners filed the present suit in district court seeking the disclosure of documents withheld by the IRS. Respondents moved for summary judgment, arguing, as is relevant here, that Williams' employee time records were exempt from disclosure under FOIA Exemptions 3 and 6, 5 U.S.C. 552(b)(3) and (6), and that petitioners were not entitled to receive Williams' time records under the Privacy Act.

On May 22, 2007, the district court granted summary judgment to respondents. Pet. App. 11a-52a. The court held, *inter alia*, that Williams' time records were properly withheld in full under Exemption 6. *Id.* at 43a-45a; cf. *id.* at 47a n.10, 52a n.10 (finding it unnecessary to address Exemption 3). The court explained that disclosure "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6), because Williams' "privacy interest outweighs the relatively minimal public interest in the manner in which Williams spent her time during the investigation." Pet. App. 43a, 45a. The court noted that "disclosure would primarily serve [petition-

ers'] particular private interests" and would not meaningfully advance the public's understanding of the government's operations or activities. *Id.* at 44a. The court further held that the time sheets could not "be disclosed under the Privacy Act without Williams'[] consent" because they reflected time Williams spent on "all of [her] job functions," were created as part of her "conditions of employment with the IRS," and "do not constitute 'records about [petitioners].'" *Id.* at 45a.

3. The court of appeals affirmed in an unpublished, non-precedential opinion. Pet. App. 1a-10a. The court of appeals held that, based on its "balance [of] the public interest in disclosure against the privacy interest" at stake, FOIA Exemption 6 exempted Williams' employee time records from mandatory disclosure. *Id.* at 5a-7a. The court reasoned that "Williams has a privacy interest in her records as a whole because they are a personal recording of how she spent her time at work." *Id.* at 6a. On the other side of the balance, the court concluded that public disclosure of the time sheets "would not 'contribute significantly' to the public understanding of the operations of the IRS or 'appreciably further the citizens[']' right to be informed about what their government is up to.'" *Id.* at 7a (quoting *Sheet Metal Workers Int'l Ass'n* v. *Department of Veterans Affairs*, 135 F.3d 891, 900 (3d Cir. 1998), and *Department of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994) (*DoD*)). "Indeed, disclosure of her records would only serve [petitioners'] narrow interest in knowing how she investigated their particular case." *Ibid.* The court accordingly held that, even if "Williams'[] privacy interest" in her time sheets were "slight," that interest "outweighs th[e] weak public interest in * * * disclosure." *Ibid.*

The court of appeals further held that disclosure was inappropriate under the Privacy Act. Pet. App. 7a-8a. The court explained that the Privacy Act permits an individual to request access to his records or "any information pertaining to him" contained in a system of records in which such information is retrieved by the individual's name or other identifier, and that the Privacy Act normally prohibits disclosure of such records "except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." *Id.* at 8a (quoting 5 U.S.C. 552a(b) and (d)(1)). Those provisions, the court concluded, prohibited disclosure of Officer Williams' time sheets to petitioner Lawrence Berger.[1] It explained that the "records were created pursuant to the conditions of [Williams'] employment, not * * * 'in connection with' her investigation of [petitioners]"; they document "the time Williams spent performing her job duties," which extend far beyond her investigation of petitioners; and they include such matters as Williams' "vacation time and sick leave." *Ibid.* The court accordingly held that "the time records pertain to Williams, not Berger, and cannot, absent the consent of Williams, be released under the Privacy Act." *Ibid.*

ARGUMENT

The unpublished, non-precedential decision of the court of appeals is correct and does not conflict with the decisions of this Court or any other court of appeals.

---

[1] Because the Privacy Act permits an "individual" to have access to his own records, 5 U.S.C. 552a(a)(2) and (d)(1), the Privacy Act claim for Williams' time sheets is pressed only on behalf of petitioner Berger and not petitioner Realty Research Corporation. Pet. 31 n.9; cf. Pet. App. 8a n.4, 10a n.4.

Although the court's decision articulates a standard of appellate review for factual determinations in FOIA cases that is the subject of a division of authority among the courts of appeals, that language did not influence the court's own evaluation of the balance of interests under FOIA Exemption 6. The court's resolution of that legal question, like its resolution of petitioner's Privacy Act claim, is correct and raises no issue meriting certiorari. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 5-18) that this Court should grant review to resolve a conflict among the courts of appeals regarding the proper standard of appellate review for FOIA cases decided at summary judgment. The court of appeals described the prevailing standard in the Third Circuit for reviewing factual determinations in the FOIA context, namely, that a district court's factual finding is reviewed to ensure that it has an "adequate factual basis" and is not "clearly erroneous." Pet. App. 4a-5a (citing *Abdelfattah* v. *Department of Homeland Sec.*, 488 F.3d 178, 182 (3d Cir. 2007) (per curiam), and *Lame* v. *Department of Justice*, 767 F.2d 66, 70 (3d Cir. 1985)). While other courts apply more traditional *de novo* review to all questions at summary judgment in FOIA cases, see, *e.g.*, *Missouri ex rel. Garstang* v. *Department of the Interior*, 297 F.3d 745, 749 & n.2 (8th Cir. 2002), the appropriate standard was irrelevant to the court of appeals' decision, which turned on its own Exemption 6 balancing of the public interest in disclosure against the privacy interest at stake. Further review is unwarranted because resolution of the proper appellate standard of review of factual issues would have no impact on this Court's disposition of this case.

Petitioners correctly concede that a court's Exemption 6 balancing is a question of law, Pet. 13-14, and that the Third Circuit itself conducts *de novo* review of such legal questions under FOIA. Pet. 11 (citing *Sheet Metal Workers Int'l Ass'n* v. *Department of Veterans Affairs*, 135 F.3d 891, 896 (3d Cir. 1998)). Nothing indicates that the court of appeals' unpublished, non-precedential decision in this case disregarded its own binding precedent in this regard. The court's standard-of-review discussion cites its prior decision in *Lame*, which makes clear that such legal questions are reviewed *de novo* and that the Third Circuit's standard for reviewing factual determinations applies when a district court makes factual findings based on an *in camera* review of the underlying documents. See *Lame*, 767 F.2d at 69-70. The court of appeals' Exemption 6 balancing likewise relies heavily on, and repeatedly cites, its earlier decision in *Sheet Metal Workers*, see Pet. App. 6a, which (as petitioners note) confirms that the Third Circuit conducts such balancing *de novo* on appeal. *Sheet Metal Workers*, 135 F.3d at 896-897, 902-905. Both parties also advised the court that non-factual determinations are reviewed *de novo*, Pet. C.A. Br. 3; Gov't C.A. Br. 15, and the court's decision reflects that it conducted its own Exemption 6 balancing afresh. See Pet. 6a-7a.

Moreover, the division of authority upon which petitioners rely concerns an issue that is not frequently dispositive in FOIA litigation. Most summary judgments under FOIA do not rest on a district court's factual findings resolving a genuine issue of material fact in favor of one litigant based on an *in camera* review of the underlying documents. This case is no different. The district court here concluded that the "general summary judgment standards appl[ied]" to its decision, that it would

be "inappropriate for [the] district court to resolve factual disputes," and that "[s]ummary judgment may be granted *only if*" there is "no genuine issue of material fact" in dispute. Pet. App. 18a-20a (emphasis added; citation omitted). The district court accordingly did not base its Exemption 6 analysis on findings concerning disputed facts. *Id.* at 43a-45a. Indeed, it would not have done so on the summary judgment record, which included declarations from IRS employees regarding the records at issue and a *Vaughn* index, see, *e.g.*, C.A. App. 208-319, 378-390, but did not contain the underlying records for the court's *in camera* review. See Pet. App. 22a-24a. Not only have petitioners failed to challenge in their petition—and have therefore abandoned—the district court's discretionary decision not to conduct an *in camera* review, cf. *id.* at 8a-9a, they also fail to identify any record evidence giving rise to a genuine issue of material fact concerning the Exemption 6 analysis conducted by the courts below. In short, the proper standard of appellate review for factual findings in FOIA cases had no bearing on the proper disposition of this case. That issue therefore does not merit further review in this case, especially since the decision below is unpublished and recited the standard of appellate review of factual issues only in passing.

2. Petitioners contend (Pet. 18-31) that the court of appeals erred in its FOIA analysis by according too much weight to Officer Williams' privacy interest in her daily time sheets under FOIA Exemption 6 and in concluding that her privacy interest outweighed the public interest in disclosure. Those contentions are without merit.

a. The court of appeals correctly concluded that Williams has a cognizable privacy interest in her time re-

cords. Although petitioners argue (Pet. 19-22) that "purely work-related information" cannot implicate personal privacy, that contention is inconsistent with the text of Exemption 6 and the decisions of this Court. This Court has repeatedly emphasized that FOIA's "concept of personal privacy" does not reflect a "limited or 'cramped notion' of that idea." See *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 165 (2004) (quoting *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) (*Reporters Comm.*)). Indeed, FOIA affords broad protection to a wide range of privacy interests that promote "the individual's control of information concerning his or her person," *Reporters Comm.*, 489 U.S. at 763-764, and that extend well beyond merely "intimate" or "highly personal" details, *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600 (1982) (citation omitted).

Exemption 6 by its terms applies to "*personnel* and medical files and similar files" the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6) (emphasis added). This Court has thus recognized that "[i]nformation such as * * * employment history[] and comparable data" may be exempt from disclosure under Exemption 6 even though such information "is not normally regarded as highly personal." *Washington Post Co.*, 456 U.S. at 600. The Court has likewise held that Exemption 6 contemplates redaction of purely work-related information in the form of case summaries of honor code violations by Air Force Academy cadets to protect the personal privacy of those government employees. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 376-377, 380-381 (1976).

Those decisions reflect the understanding that the privacy interest at stake must be analyzed in light of the fact that a FOIA release requires disclosure to the public generally, which "must have the same access under FOIA" as any particular requester. *Department of Defense* v. *FLRA*, 510 U.S. 487, 501 (1994); see *id.* at 496; *Favish*, 541 U.S. at 174. The public disclosure of an employee's time sheets detailing the specifics of her daily activities certainly implicates a non-trivial privacy interest. At the very least, an individual like Officer Williams has an interest in avoiding the potential harassment from disgruntled subjects of IRS investigations pursuing her employment records. And, while the court of appeals expressed the view that that privacy interest might be "slight," it nevertheless outweighs the relevant public interest in disclosing such records. Pet. App. 7a.

b. Petitioners argue (Pet. 23-28) that a "slight" privacy interest cannot justify withholding under Exemption 6 and that only a "significant" interest can be sufficient to establish a "clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6). That contention is meritless. The court of appeals not only applied Exemption 6's "clearly unwarranted" standard, Pet. App. 5a (quoting 5 U.S.C. 552(b)(6)); this Court itself has made clear that "a *very slight* privacy interest would suffice" under Exemption 6 when the public interest in disclosure is sufficiently small. *DoD*, 510 U.S. at 500 (emphasis added).

c. Petitioners thus ultimately challenge the Exemption 6 balance struck by the court of appeals by asserting that there is a "strong" public interest in disclosure of Williams' time sheets. Pet. 28-31. The court of appeals, however, correctly concluded that "disclosure of [Williams'] records would *only* serve [petitioners'] nar-

row interest in knowing how she investigated their particular case." Pet. App. 7a (emphasis added).

It is well settled that "the only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *DoD*, 510 U.S. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773) (brackets in original). A FOIA requester's own private interest in disclosure—like that at issue here—has "no bearing" in the relevant analysis. *Id.* at 496 ("identity of the requesting party" and the "purposes for which the request for information is made" are irrelevant) (quoting *Reporters Comm.*, 489 U.S. at 771). Instead, the disclosure must "appreciably further" public knowledge of the government's operations or otherwise open up agency action to the light of public scrutiny in a "meaningful way." *Id.* at 497-478 (citation omitted).

Disclosure of Williams' time sheets would serve no such public interest. Petitioners seek only those time entries relating to the petitioners' own tax investigation, Pet. 19, yet they claim that such a disclosure would "shed light on the manner in which the IRS conducts civil tax investigations," reveal whether IRS employees are "carry[ing] out their duties in an efficient and law-abiding manner," and show whether the "investigation [of petitioners] was comprehensive" and cost-effective. Pet. 29-30 (citations omitted). Employee time sheets detailing the "total hours [Williams] spent on the investigation"—even assuming those records generally reflect the "tasks she performed," Pet. 30—would not reveal anything meaningful to the public about the IRS generally or the investigation of petitioners specifically. To

make a meaningful assessment of that investigation, the public would need to have a more detailed understanding of what was investigated than might be reflected in daily time records. At the very least, the public would also need access to petitioners' relevant tax and other records at issue in the investigation in order to evaluate meaningfully Williams' performance and reasonably assess whether the investigation was comprehensive or cost-effective. Such taxpayer-specific materials, of course, are specifically protected from public disclosure by statute. See, *e.g.*, 26 U.S.C. 6103.

In the end, petitioners request this Court to review the court of appeals' Exemption 6 holding without identifying any decision of this Court or any other court of appeals with which that holding is in conflict. No further review of that holding is warranted.

3. Petitioners' Privacy Act contentions (Pet. 31-36) are equally unavailing. The court of appeals concluded that the Privacy Act did not permit petitioner Berger to obtain access to Williams' employee time records because those records pertained to Williams, not Berger. Pet. App. 7a-8a. That fact-bound determination presents no issue justifying this Court's review.

The Privacy Act generally provides that "[e]ach agency that maintains a system of records shall," upon "request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit [the individual] * * * to review the record." 5 U.S.C. 552a(d)(1). However, the Act further requires that, subject to exceptions not relevant here, "[n]o agency shall disclose any record which is contained in a system of records" without the written consent of "the individual to whom the record pertains." 5 U.S.C. 552a(b).

Petitioners do not contest that Williams' employee time records pertain to Williams. They instead suggest that the time sheets also pertain to Berger. Pet. 32-33, 34-35; see Pet. 31 n.9. The evidentiary record, however, does not support that contention. The time sheets themselves are not in the record, cf. Pet. App. 23a (declining to conduct *in camera* review), and the declaration that describes them states that the documents are Williams' "personal recording of the time [she] expended as [an IRS] employee over a particular period of time," including the time that she spent "examining various taxpayers" and the time she "reported as sick leave, vacation time, training, and for other administrative purposes." C.A. App. 388. Those records, the declaration adds, "were created as a result of and in accordance with her term of employment" and "are not records about [petitioner Berger]." *Id.* at 389. The court of appeals reviewed the summary judgment record *de novo* and, like the district court, concluded that the evidence showed that Williams' time records did not pertain to Berger. Pet. App. 8a, 45a.[2]

Relying on *Voelker* v. *IRS*, 646 F.2d 332 (8th Cir. 1981), petitioners argue that, "if a record concerns two people, the record may be retrieved [under the Privacy Act] by either person without the consent of the other." Pet. 35. The summary judgment record, however, does not show that Williams' time sheets actually pertain to petitioner Berger, and that factual shortcoming alone makes this case a poor vehicle to review petitioners' fact-bound contentions.

---

[2] The court of appeals based its ruling on a *de novo* review of the Privacy Act claim, applying the same summary judgment standard as the district court. Pet. App. 7a.

Moreover, even if Williams' time sheets included references to Berger, this Court's review would not be warranted because the court of appeals' decision does not conflict with *Voelker*. In *Voelker*, the IRS completed an investigation of Voelker and Voelker sought access to his investigatory record under the Privacy Act. 646 F.2d at 333. The IRS redacted those portions of the record that involved "personal information pertaining to a third party" because it reasoned that such information did not "pertain" to Voelker. *Ibid.* The court concluded that such redaction was improper because Section 552a(d)(1) "clearly states that an individual is entitled to *his record*" and, therefore, does not require that the individual "meet some separate 'pertaining to' standard" when seeking to access information in his own file. *Id.* at 334. *Voelker* thus holds that "information contained in a requesting individual's record" cannot be withheld "on the ground that the [particular] information does not pertain to that individual." *Ibid.* The records at issue here, in contrast, are Williams' time records, which document the time spent by Williams on various job-related matters. Even if a portion of those records refers to Berger, *Voelker* merely supports the proposition that Williams (not Berger) would be entitled to have access to all of her time records, even if portions mention other individuals. *Voelker* does not speak to the distinct question whether an individual referred in Williams' time records would also be entitled to access to those records.[3]

---

[3] Petitioners make two additional arguments, neither of which suggests that certiorari is warranted. First, petitioners contend (Pet. 33-34) that Williams' daily time sheets may be retrieved by Berger's name from an IRS "system of records" based on an assertion that the records are actually part of the "ENTITY Case Management System." Second,

The court of appeals' conclusion that Williams' time records do not pertain to petitioner is fact-bound, and petitioners identify no conflict of authority that would justify review of the court of appeals' unpublished, non-precedential decision. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN DICICCO
Acting Assistant Attorney General
JONATHAN S. COHEN
GRETCHEN M. WOLFINGER
Attorneys

MAY 2009

---

they argue (Pet. 35-36) that Williams' time sheets are not exempt from disclosure under Section 552a(k)(2). The government disputed those contentions, Gov't C.A. Br. 17-19, which petitioners raised for the first time on appeal, and the court of appeals found it unnecessary to resolve either question in light of its determination that the time sheets did not pertain to Berger. See Pet. App. 8a & n.5, 10a n.5.